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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SERVETTE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit entered in this case on November 26, 1962.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–17a) is reported at 310 F. 2d 659. The findings of fact, conclusions of law, and order of the Board (R. 36–41) [1] are reported at 133 NLRB 1501.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1962 (App. A, *infra*, p. 20a). A

[1] "R." refers to the Transcript of Record in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

motion for clarification of opinion, filed by the Board, was denied on January 22, 1963 (App. A, *infra*, pp. 18a–19a). On February 21, 1963, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including April 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether it violates the National Labor Relations Act for a labor union, without threats or coercion, to ask the managers of retail stores who are authorized to select the sources of goods for resale to cease to patronize a supplier which the union considers unfair.

2. Whether it violates the National Labor Relations Act for a labor union to pass out handbills outside a retail store calling attention to the fact that the store carries products of a wholesaler which the union considers unfair, and asking the public not to purchase such products.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 38a–40a.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Respondent Servette is a wholesale distributor of candy, holiday supplies, and specialty merchandise in the Los Angeles area (R. 18; 4). Kory's Markets, Inc., McDaniels Markets, and Daylight Markets (here-

in referred to as Kory, McDaniels, and Daylight) separately operate chain retail food supermarkets in that area (R. 18–19; 71). Kory, McDaniels, and Daylight regularly and customarily purchase, handle, stock and sell products distributed by Servette (R. 18–19; 56, 59–60, 61–65, 67–71).

In early February 1960, as a result of a labor dispute with Servette, the Union struck and picketed Servette's warehouse in Los Angeles (R. 19; 74–75). From February 3 through March 10, 1960, the Union, in furtherance of its strike against Servette, approached the managers of a number of retail markets stocking products distributed by Servette and asked them to cooperate with the Union by not dealing with Servette. In most instances the Union advised these managers that, if they continued to deal with Servette, the Union would pass out handbills to the customers of the stores. If the stores failed to cooperate, the Union in fact distributed these handbills which read as follows (R. 20; 84, 54–55):

TO THE PATRONS OF THIS STORE

WHOLESALE DELIVERY DRIVER. & SALESMEN'S LOCAL NO. 848 urgently requests that you do not buy the following products distributed by SERVETTE, INC.:

* BRACH'S CANDY
* SERVETTE CANDY
* GOOD SEASON SALAD DRESSING
* OLD LONDON PRODUCTS

The SERVETTE COMPANY which distributes these products refuses to negotiate with the

Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts. These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of SERVETTE appreciate your cooperation in this fight.

Several store managers stopped handling Servette products.[2]

B. THE BOARD'S CONCLUSIONS AND ORDER

Relying upon its decision in *Local Union No. 505, IBT (Carolina Lumber Co.)*, 130 NLRB 1438, the Board concluded that the Union's appeal to the various store managers did not violate Section 8(b)(4)(i)(B) of the Act (R. 37–38). In *Carolina Lumber*, the Board had held that Section 8(b)(4)(i) does not prohibit appeals directed to individuals high enough in the managerial hierarchy to control business relations with the primary employer, but only inducements directed to individuals, such as rank-and-file workers and low level supervisors, who merely have power, through work stoppages and related conduct, to put pressure on those higher in the enterprise.

The Board (with Member Rodgers dissenting) further concluded, on the authority of its holding in *International Brotherhood of Teamsters, etc., and Dairy Employees Local 537 (Lohman Sales Com-*

[2] Jerry Finley, the Union's business agent, testified that in the course of its campaign against Servette the Union distributed the handbill described above at "well over 50" retail chain supermarkets in the greater Los Angeles area (R. 77).

pany), 132 NLRB 901, that the Union's handbilling at the various stores doing business with Servette was protected by the "publicity" proviso and thus did not violate Section 8(b)(4)(ii)(B) of the Act (R. 38–40). In *Lohman*, the Board had held that the publicity proviso to Section 8(b)(4) was not limited to a situation where the union's primary dispute was with a manufacturer of products, but applied as well where the primary employer was engaged in other forms of business such as distribution. The Board accordingly dismissed the complaint in its entirety (R. 38).

C. THE DECISION OF THE COURT OF APPEALS

The court below held that Section 8(b)(4)(i) encompasses appeals directed to any supervisory personnel, and that the Union's inducement of the store managers violated that section (App. A, *infra*, pp. 1a–17a). The court held further that the Union's handbilling was not protected by the "publicity" proviso to Section 8(b)(4) because Servette was a distributor. The court followed its decision in *Great Western Broadcasting Corporation* v. *National Labor Relations Board*, 310 F. 2d 591, in which it held that the proviso applied only where the primary employer was a manufacturer of a physical product. (App. A, *infra*, pp. 17a, 21a–37a.) The court therefore set aside the Board's order and remanded the case for further proceedings consistent with its opinion.

REASONS FOR GRANTING THE WRIT

This case brings before the Court two new and important questions arising under the 1959 amend-

ments to the secondary boycott provisions of the National Labor Relations Act. Both have general and basic importance in the Board's administration of the Act. On the first question there is already a conflict between the circuits.

1. The court below erroneously held that it is an unfair labor practice for a labor union to ask store managers, who are themselves responsible for selecting the sources of products sold in their stores, to cease buying the products of another company which the union regards as unfair. It based this ruling upon Section 8(b)(4)(i) which provides that it shall be an unfair labor practice for a labor organization—

> to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services

where an object is to force such person to cease doing business with any other person.

The court wholly misconceived the purport of this provision. It deals with secondary pressure, *i.e.*, with a union's appeal to one or more individuals who work for Firm A to cease performing employment services in order to force Firm A to stop doing business with Firm B, with which the union is engaged in controversy. It is the putting of economic pressure upon Firm A, by cutting off employment services, that Section 8(b)(4)(i) seeks to prevent. The provision leaves the union entirely free to ask

Firm A and all firms similarly situated to join in a primary boycott, *i.e.* to break off their business relations with Firm B so long as the labor dispute continues. The decisive question is whether the union merely requested the appropriate person to make that managerial decision or asked an individual employed by Firm A to quit all or part of his work so as to coerce the firm's decision.

If Firm A is a small individual proprietorship, A is the one who decides whether to continue to deal with Firm B; and Section 8(b)(4)(i) is obviously inapplicable to a union's request that he join in a primary boycott.[1] If Firm A is a corporation, the decision whether to join in the primary boycott must be made by some individual (or group) who is an employee of the corporation with managerial powers. The controlling principle, nevertheless, is the same. If the union merely asks the corporation to join in the primary boycott by addressing itself to the individual with the authority to make that decision, there is no violation. Section 8(b)(4)(i) is violated, if at all, only if the request is that the individual stop performing employment services so as to put secondary pressure upon the managers of Firm A in reaching their decision.

In the present case it is entirely clear that the store managers were merely requested to exercise their authority to decide whether to continue, or cease, buying from Servette. The action they were asked

[1] Section 8(b)(4)(ii) comes into play, as discussed below, if the request is accompanied by a threat or coercion.

to take—the decision they were asked to make—was identical to the request that would be made of an individual proprietor. There was no secondary pressure. Referring to the words of Section 8(b)(4)(i), the store manager was not asked "to engage in a strike" or to do anything "in the course of his employment" that can fairly be described as a refusal "to use, manufacture, process, transport, or otherwise handle or work on any goods" or "to perform any services" with an object of "forcing or requiring" the manager's employer to cease dealing with Servette. The managers were asked only to exercise their managerial authority on behalf of their employers and in accordance with the discretion vested in them by their employers. They were not asked to force or require their employers to do anything at all.

This analysis of Section 8(b)(4)(i) is confirmed by its legislative evolution. Prior to the 1959 amendments Section 8(b)(4)(A) declared it an unfair labor practice for a labor organization—

> to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services

where an object was to force such employer to cease doing business with any other person. That provision was manifestly concerned with inducement of the employees of Firm A to stop working in order to coerce Firm A's decision about doing business with

Firm B. The provision was not aimed at requests to Firm A without the secondary pressure. The 1959 amendments substituted the phrase "individual employed by any person" for "employees of any employer," thus making the provision applicable to employees (in a colloquial sense) who were not technically "employees" within the statutory definitions—government employees, railway and airline employees, and supervisors.[4] The other change struck out the word "concerted" and changed the plurals into the singular, so that secondary pressure became unfair even if the inducement was directed to only one individual. But the central theme of the prohibition was left unchanged—it still runs only against secondary pressure in the form of inducement to refuse to perform employment services.

While the Board has held in other cases that Section 8(b)(4)(i) had no application whatever to managerial employees,[5] there is nothing in the Board's actual decision in this case, or in our position here, inconsistent with the view that any inducement of any individual to refuse to do his normal work is within Section 8(b)(4)(i) no matter how high the individual may rank in the corporate hierarchy. The decisive consideration here is that the Union was requesting managerial employees, not to refuse to perform their work, but to exercise their authorized managerial discretion.

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[4] See p. 10, n. 6, *infra*.

[5] See *Local Union No. 505, IBT (Carolina Lumber Co.)*, 130 NLRB 1438.

Section 8(b)(4)(ii) buttresses the view that the 1959 amendments permit a labor union to ask an employer—and therefore to ask the authorized managerial employees of a corporation—to join in a primary boycott. That provision, unlike the prior subdivision, does deal with primary boycotts. It forbids a union to "threaten, coerce or restrain" any person where an object thereof is forcing him to cease doing business with any other person. It leaves the union free to request, or beg, or persuade a firm to aid it voluntarily by breaking off relations with an unfair employer, and manifestly there is nothing unlawful in giving such support. The legislative history shows that the words were chosen deliberately in order not to interfere with the union's freedom to obtain truly voluntary assistance from sympathetic employers as had often occurred in the past.[6] As the sponsors of the bill plainly recognized,[7] in the case of a corporation the union's pleas can be directed only to the individuals duly authorized by the corporation to make such decisions in its behalf—in this case the individual store managers.

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[6] See 105 Cong. Rec. 14347 (Analysis submitted by Congressman Griffin), 15532 (Congressman Griffin), 16589–16590 (Analysis submitted by Senator Kennedy and Congressman Thompson), 17881–17882 (Senator Morse), 19849 (Senator Dirksen); II Leg. Hist. of the Labor-Management Relations and Disclosure Act of 1959 (G.P.O., 1959), 1522–1523, 1568, 1706–1707, 1426, 1822.

[7] See Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess., on S. 505, *et seq.*, pp. 304–306.

The decision below, as the court itself acknowledged, is in conflict with the decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Local 294, Teamsters* (Van Transport Lines), 298 F. 2d 105. See also *Alpert* v. *Excavating & Building Material Chauffeurs, Local 379*, 184 F. Supp. 558, 561 (D. Mass.), where Judge Wyzanski held that Section 8(b)(4)(i) "does not cover appeals to those who on behalf of their employer have power lawfully to terminate, cease, or otherwise control business relations with the so-called primary employer."

The question recurs frequently in the administration of the Act. Already ten other cases have reached the stage of formal Board decision.[8] Fairness to both employers and labor organizations requires that the issue be promptly settled.

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[8] In addition to the instant case, the other cases which have thus far reached the stage of formal Board decision are: *Local Union No. 505, IBT* (*Carolina Lumber Co.*), 130 N.L.R.B. 1438; *Local 294, IBT* (*Van Transport Lines, Inc.*), 131 N.L.R.B. 242; *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* (*Peyton Packing Company, Inc.*), 131 N.L.R.B. 406; *Sheet Metal Workers International Association, Local Union No. 299* (*S. M. Kisner and Sons*), 131 N.L.R.B. 1196; *Local 324, International Union of Operating Engineers* (*Brewer's City Coal Dock*), 131 N.L.R.B. 228; *Upholsterers Frame & Bedding Workers Twin City Local No. 61* (*Minneapolis House Furnishing Co.*), 132 N.L.R.B. 40; *Excavating and Building Material Chauffeurs and Helpers Local Union No. 379* (*Consalvo Trucking, Inc.*), 132 N.L.R.B. 827; *International Brotherhood of Teamsters, etc., and Dairy Employees Local 537* (*Lehman Sales Company*), 132 N.L.R.B. 901; *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 901* (*Editorial "El Imparcial," Inc.*), 134 N.L.R.B. 895; *Warehouse Employees Union, Local 730* (*C. R. Sheaffer and Sons*), 136 N.L.R.B. 968.

2. The second question of general importance raised by the decision below concerns the scope of the final proviso to Section 8(b)(4). Distributing handbills outside a retail store requesting potential customers not to purchase the goods of a particular supplier, like Servette, would be an unfair labor practice under Section 8(b)(4)(ii) because the union would be coercing or restraining the retailer with the object of forcing it to cease dealing in the products of the supplier, if it were not for the final proviso, which provides that nothing contained in Section 8(b)(4)—

> shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *.

The court below erred in holding the proviso inapplicable. Distributing handbills is certainly a form of publicity and the handbills truthfully advised the public that the stores were distributing the products of Servette with whom the union had a primary dispute. There was no picketing. The store distributed Servette's products. The only question, therefore, was whether the candy, salad dressing and "Old London Products" were "a product or products produced by" Servette.

We submit that the operations of a wholesaler like Servette fall within the quoted phrase. "Produced" is a familiar term in labor law. Even if we assume *arguendo* that, contrary to the Board's view,[*]

[*] See p. 16, n. 10, *infra*.

it is a word of limitation, its well-known meaning is amply broad enough to cover the activities of a wholesaler who buys and stores goods, breaks lots, repackages, relabels or otherwise handles the goods. Under the Fair Labor Standards Act the term "produced" is defined as "produced, manufactured, mined, handled, or in any other manner worked on" (29 U.S.C. 203(j)), and has been long and regularly applied to employees of distributive organizations engaged in obtaining merchandise in large lots and distributing it to smaller outlets. See, *e.g.*, *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490; *Walling* v. *Mutual Wholesale Food Co.*, 141 F. 2d 331, 340 (C.A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C.A. 8); *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329 (C.A. 7); *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C.A. 8).

Similarly, although the War Labor Disputes Act did not include the express definition of "produced" found in the Fair Labor Standards Act, it was held in *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369 (C.A. 7), that the general retail department and mail order business of Montgomery Ward & Co. so far involved the production of goods that these facilities could lawfully be seized under the statute authorizing the seizure of facilities equipped "for the manufacture, production, or mining of any * * * materials" (50 U.S.C. App. (1946 ed.) 1503).

If the word "produced" be given the above described meaning, the proviso, at the very least, has the effect of allowing a labor union to follow down to the retail level products which are handled at any stage in the course of manufacture and distribution by an

employer who fails to conform to what the union regards as fair employment standards. Thus construed, the proviso would permit a labor union to follow an "unfair" product but not to spread the labor dispute more widely through the community by putting pressure upon any firm that had any form of business relations with any firm engaged in a labor dispute. This distinction was well known in labor law and was presumably before the draftsmen of the 1959 amendments. Compare, *Bossert* v. *Dhuy*, 221 N.Y. 342, 117 N.E. 582, and *Goldfinger* v. *Feintuch*, 276 N.Y. 281, 11 N.E. 2d 910, with *Auburn Draying Co.* v. *Wardell*, 227 N.Y. 1, 124 N.E. 97. See also Gromfine, *Labor's Use of Secondary Boycotts*, 15 Geo. Wash. L. Rev. 327, 328; Gregory, *Labor and the Law* (Norton, 1961 ed.), pp. 132–153.

The court below attributed a false significance, we think, to the use of the words "manufacture" and "producer, processor or manufacturer" in earlier parts of Section 8(b)(4). It is evident that these terms were not intended to draw any distinction but, rather, were a proliferation of nouns in order to be sure to cover all forms of activity without distinguishing between them; for all are treated alike. The fact that the draftsmen of the proviso used only the broadest words "product or products" and "produced" does not show that they intended them to cover only a manufacturer narrowly defined. Indeed, if that had been the purpose, the 1959 draftsmen with the earlier words before them would undoubtedly have used the word "manufacturer" or "processor" instead of the broader term "producer."

Similarly, we submit that no significance can be drawn from the fact that another version of the proviso, contained in a request by the Senate conferees for instructions from the Senate, read (105 Cong. Rec. 17333; II Leg. Hist. 1383):

> *Provided,* That nothing contained in this subsection (b) shall be construed * * * to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor dispute * * *.

There was no vote on the request because the Chairman of the Senate Conferees, Senator Kennedy, shortly later reported that the Conferees had accepted the proposals of the Senate's representatives. All the other evidence in the legislative history indicates that the intent of the proviso was to authorize all forms of appeals to the public not to purchase "unfair goods" provided that the publicity was not accompanied by picketing.* Moreover, since any restriction upon publicity other than picketing might raise constitutional questions, the proviso should be broadly construed.

We recognize that a complete delineation of the scope of the proviso will probably require a number of decisions. The Board has not confined the proviso

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* See 105 Cong. Rec. 16591 (Senator Kennedy and Congressman Thompson), 17720 (Senator Kennedy), 17898–17899 (Senator Kennedy); II Leg. Hist. 1708, 1388–1389, 1431–1432.

to the situation presented in the present case, where the union was following the goods themselves, but has extended it more broadly to publicity involving any economic relations between the establishment where the handbilling takes place and an employer with whom the union is in dispute.[10] Since that question is not raised by the present case, its resolution must await further litigation. Nevertheless, the present issue is important and recurring. Most of the instances of appeals to the general public not to buy unfair products relate to a retailer's distribution of such goods and, in many instances, the union's dispute is with a subsequent processor or wholesaler rather than with the original manufacturer. An early decision upon the present question would contribute greatly to the establishment of principles for the administration of the 1959 amendments to the National Labor Relations Act.

It is particularly appropriate that the Court grant review of this issue now. The Court has before it the related question of whether Section 8(b)(4)(ii)(B) of the Act reaches secondary consumer picketing. *National Labor Relations Board* v. *Fruit & Vegetable Packers*, No. 921, this Term, petition for certiorari pending. At the same time that the Court decides this question, it would be desirable for it to consider, and decide, the extent to which the same secondary objective may be pursued through forms of publicity other than picketing.

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[10] See *Middle South Broadcasting Co.*, 133 NLRB 1698; *Great Western Broadcasting Corporation (KXTV)*, 134 NLRB 1617, reversed and remanded, 310 F. 2d 591 (C.A. 9).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1963.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Nov. 26, 1962

On Petition to Review an Order of the National Labor Relations Board

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Before: CHAMBERS and JERTBERG, *Circuit Judges*, and CLARK, *District Judge*

JERTBERG, *Circuit Judge:*

This case is before the court upon the petition of Servette, Inc. to review a decision and order of the National Labor Relations Board dismissing an unfair labor practice complaint which had issued upon charges filed by petitioner. The Board's decision is reported at 133 NLRB p. 1501. (Oct. 30, 1961).

The case involves an attempt by the Wholesale Delivery Drivers and Salesmen's Union, Local No. 848, to force several retail markets to cease doing business with petitioner with whom the Union was having a labor dispute. It was charged that the Union activity was proscribed by § 8(b)(4)(i)(ii)(B)

of the National Labor Relations Act, as amended 29 U.S.C. § 158(b)(4)(i)(ii)(B).[1]

The primary facts are not in dispute. Petitioner is a wholesale distributor of specialty merchandise such as candy, liquor, holiday supplies and specialty articles in the area of Los Angeles, California. Included in such merchandise are brand name products, i.e., GOOD SEASON SALAD DRESSING and OLD LONDON PRODUCTS. Kory's Markets, Inc., McDaniels Markets and Daylight Markets (herein referred to as Kory,

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[1] The relevant provisions of the National Labor Relations Act, as amended, are as follows:

"SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents * * *

* * * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:

* * * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person,

* * * * * *

"*Provided, further*, That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

McDaniels and Daylight) separately operate chain retail food supermarkets in the area of Los Angeles, California. All of such markets regularly and customarily purchase, handle, stock and sell products distributed by petitioner.

In early February, 1960, as a result of a labor dispute with petitioner, the above named Union engaged in a strike against petitioner and picketed petitioner's warehouse located in Los Angeles. From February 3rd through March 10th, 1960, the Union in aid and support of its strike against petitioner, engaged in a campaign to enlist the aid and cooperation of Kory, McDaniels and Daylight to cease doing business with petitioner.

In its efforts to win the labor dispute with petitioner, agents of the Union engaged in the following conduct and practices:

1. Told the manager of McDaniels Market No. 14 that the Union had a labor dispute with petitioner. Asked him to cooperate by not dealing with petitioner and by taking petitioner's merchandise off his shelves. Told him that if he failed to cooperate they would pass out handbills to customers. Handbills were passed out but the manager continued his purchases from petitioner. The handbills passed out at this market, as well as at other markets herein mentioned, read as follows:

"To THE PATRONS OF THIS STORE"

"WHOLESALE DELIVERY DRIVERS & SALESMEN'S LOCAL NO. 848 urgently requests that you do not buy the following products distributed by SERVETTE, INC.:

"• BRACH'S CANDY
• SERVETTE CANDY
• GOOD SEASON SALAD DRESSING
• OLD LONDON PRODUCTS

"The SERVETTE COMPANY which distributes these products refuses to negotiate with

the Union that represents its drivers. The Company is attempting to force the drivers to sign individual 'Yellow Dog' contracts. These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

"The drivers of Servette appreciate your cooperation in this fight."

2. Asked the manager of McDaniels Market No. 18 to remove merchandise distributed by petitioner from his shelves. At a meeting of the store managers of McDaniels, the managers were told by higher officials to use their best judgment in the matter and to do as they thought wise. The manager of McDaniels Market No. 18 either reduced his purchases from or ceased doing business with petitioner.

3. Requested the manager of McDaniels Market No. 25 not to handle petitioner's merchandise. He was shown a copy of the handbill. The manager of McDaniels Market No. 25 either diminished or terminated his business with petitioner.

4. Requested the manager of Daylight Market No. 3 to cooperate with them in their dispute with petitioner by not handling petitioner's products, and told him they were passing out handbills to the customers of those markets which refused to cooperate.

5. Told the manager of Kory's Market No. 6 of the dispute with petitioner, showed a copy of the handbill to him, and told him that the handbills would be passed out to his customers unless Kory ceased doing business with petitioner. When the manager told them he would have to check with the main office, handbills were passed out to customers. The next week the manager refused to allow petitioner to stock his shelves. On two subsequent occasions, agents visited this market to ascertain whether or not petitioner's merchandise was on display.

6. Passed out handbills at Kory's Market No. 5.

7. Asked the manager of Kory's Market No. 1 if he would cooperate by removing petitioner's products from his shelves. The manager said he would have to ask advice from his supervisor. Handbilling occurred at this market on two different occasions.

8. Passed out handbills to the customers of Kory's Market No. 2 and told the manager that they would stop handbilling if he would cease handling petitioner's products.

9. Passed out handbills to customers of Kory's Market No. 3.

Handbilling occurred at certain of the markets above mentioned which purchased GOOD SEASON SALAD DRESSING and OLD LONDON PRODUCTS not from petitioner but from Certified Grocers of Southern California, another distributor not involved in the labor dispute existing between petitioner and the Union.

The Board, with one member dissenting, concluded that the conduct and practices of the Union did not constitute a violation of § 8(b)(4)(i)(B) and that the handbilling of the various markets doing business with the petitioner was protected by the publicity proviso to § 8(b)(4).

In its decision and order, the Board stated, in part, as follows:

> We agree with the Trial Examiner's conclusion that the appeal to the various store managers doing business with Servette did not constitute a violation of Section 8(b)(4)(i)(B), since the record establishes that the store managers whom the respondent sought to persuade not to do business with Servette were not "individuals" as that term is used in Section 8(b)(4)(i)(B). We do so, however, only for the reasons set forth in the *Carolina Lumber*

Company[3] and *Minneapolis House Furnishing Company*[4] cases. * * *

We also agree, on the basis of our recent *Lohman Sales Company* decision,[5] that the Respondent's handbilling of the various stores doing business with Servette was protected by the publicity proviso to Section 8(b)(4).

The dissenting member stated, in part, as follows:

> As I pointed out in my dissenting opinion in *Lohman Sales*, 132 NLRB No. 67, the proviso to Section 8(b)(4) does not protect handbilling of secondary employers in furtherance of a dispute with a distributor; the proviso contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette does not produce any products.
>
> Accordingly, I would find the Respondent's threats to handbill, and its subsequent handbilling activities, constitute violations of Section 8(b)(4)(ii)(B) of the Act.

The position of the Board, as stated in its reply brief, appears in the following language:

> In the Board's view, the Union's appeals to the various retail store managers did not constitute a violation of Section 8(b)(4)(i)(B) because, although the forbidden object existed, the means for attaining that object which the Section proscribes was lacking. That is, the only persons induced were the store managers

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[3] *Local 505, International Brotherhood of Teamsters, et al. (Carolina Lumber Company)*, 130 NLRB p. 1438 (Mar. 17, 1961).

[4] *Upholsterers Frame & Bedding Workers Twin City Local No. 61, etc. (Minneapolis House Furnishing Company)*, 132 NLRB p. 40 (July 11, 1961).

[5] *International Brotherhood of Teamsters, etc. Local 537 and Jack M. Lohman*, 132 NLRB p. 901 (Aug. 10, 1961).

> who cannot be regarded as "any individual employed by any person" within the meaning of Section 8(b)(4)(i)(B). Rather, the store managers must be considered as "any person" under Section 8(b)(4)(ii), and, as such, entitled to protection against the type of conduct or means specifically proscribed therein, namely, threats, coercion, or restraint.

Admittedly, each of the store managers is an individual and each is employed by a person engaged in commerce. It is the petitioner's contention that the clear wording of the phrase "any individual employed by any person" leaves no room for any construction that would exclude "supervisors" from the category described in the phrase. Petitioner also asserts that Congressional history fortifies petitioner's contention that Congressional intent in the choice of the language employed in the phrase was to make it an unfair labor practice for a union to induce or encourage "supervisors" where an object is to force or require any employer "to cease doing business with any other person."

The issue thus created arises under the amendments made to § 8(b)(4)(A) (P.L. 86-257, 73 Stat. 519, approved Sept. 14, 1959). For the amended law, see Footnote 1, *supra*.

Section 8(b)(4)(A) provided:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (4) to engage in, or to induce or encourage the *employees of any employer* to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. [Emphasis supplied.]

In its *Carolina Lumber Company* case, *supra*, upon which the Board rested its decision in the instant case, the above Section was held by the Board not to be applicable to inducement of supervisors[5] because they were not employees within the meaning of the Act,[6] and, further, that Section was held not to apply to the inducement of farm, railway, or public employees for the same reason.[7] It is to be noted (see Footnote 1, *supra*) that §8(b)(4)(i)(B) substitutes the phrase "any individual employed by any person" for the phrase "employees of any employer" as used in §8(b)(4)(A).

The Board recognized in its decision in the *Carolina Lumber Company* case, *supra*, "[t]hat the new

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[5] Title 29 U.S.C., §152(11), provides:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[6] Title 29 U.S.C., §152(3), in pertinent part, provides:

"'The term 'employee' * * * shall not include * * *, or any individual employed as a supervisor, * * *."

[7] *Sheet Metal Workers International Association, Local Union No. 28, (Ferro Co Corporation)*, 102 NLRB 1660 (supervisors); *W. T. Smith Lumber Company*, 116 NLRB 1756, reversed 246 F. 2d 129 (C.A. 5) (railroad employees); *Paper Makers Importing Co., Inc., et al.*, 116 NLRB 267 (municipal employees).

law bars inducement of a broader category of employed persons tha[n] the old * * *" but concluded from legislative history that "'any individual employed by any person' in 8(b)(4)(i) refers to supervisors who in interest are more nearly related to 'rank-and-file employees' than to 'management,' as the term is generally understood. On the other hand, the term 'person' as used in 8(b)(4)(ii) would seem to refer to individuals more nearly related to the management level. So construed, 8(b)(4)(i) would outlaw attempts to induce or encourage employees and some supervisors, to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage others more nearly related to the managerial level for the same objectives would be lawful. However, if in the latter case the labor organization went beyond persuasion and attempted to coerce such managerial officials to accomplish the proscribed objectives, it would violate 8(b)(4)(ii)."

While the Board concedes that the substituted phrase "any individual employed by any person" for the phrase "employees of any employer," shows on its face a Congressional intent to broaden the category of employed persons and that the literal meaning of the language employed by Congress is broad enough to include "supervisors" in the category described in the Section as "any individual employed by any person," it urges, nevertheless, that to give the phrase the construction urged upon us by the petitioner would be contrary to the purpose of the Act, contrary to Congressional intent, and would render § 8(b)(4)(ii)(B) of the Act meaningless and futile.

Before giving further consideration to the problem before us, we note that the definition of "supervisor" in the Act (see Footnote 5, *supra*), is broad. It means

> * * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It has long been settled by court decisions that an employee must be classified as a supervisor if he exercises any one of the powers set forth in § 2(11) of the Act. *National Labor Relations Bd.* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (6th Cir. 1948), *cert. denied* 335 U.S. 908; *Ohio Power Co.* v. *N.L.R.B.*, 176 F. 2d 385 (6th Cir. 1949), *cert. denied* 338 U.S. 899; *N.L.R.B.* v. *Fullerton Publishing Company*, 283 F. 2d 545 (9th Cir. 1960); *N.L.R.B.* v. *Southern Airways Company*, 290 F. 2d 519 (5th Cir. 1961). Supervisory status is determined by the powers and duties of an employee, and not by his title. *National Lab. Rel. Bd.* v. *Southern Bleachery & Pr. Wks.*, 257 F. 2d 235 (4th Cir. 1958), *cert. denied* 359 U.S. 911.

The court decisions are in accord with legislative history, as noted in *N.L.R.B.* v. *Southern Airways Company, supra,* at p. 523:

> The legislative history of § 2(11) is helpful in this regard. The Senate Report envisaged a "supervisor" under the Act as being an employee "vested with such general management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. * * *" Sen. Rep. 105, 80th Cong.; 1 Leg. His. of the L.M.R.A. p. 410; *Poultry Enterprises, Inc.* v. *N.L.R.B.*, 5 Cir., 1954, 216 F. 2d 798, 801. As expressed on the floor of the Senate, to come within this category the individual should 'direct responsibly' the

action of employees under him. 2 Leg. His. of the L.M.R.A., p. 1303; *N.L.R.B.* v. *Swift & Co.*, 9 Cir., 1957, 240 F. 2d 65, 66 note 1. The Conference Report on the Bill later enacted into § 2(11) shows that the definition was intended to cover persons "generally regarded as foremen and persons of like or higher rank." 1947 U.S. Code Cong. & Admin. News, pp. 1135, 1141.

It is clear to us that under the old Section insofar as relevant to the problem before us, "employees of an employer" embraced all employees except supervisors as defined in the Act and that there existed but one category of employees who were excluded from the term "employees" and that category was by law defined as "supervisors."

It must be assumed that members of Congress were aware of the definitions contained in the Act and the unanimity of court decisions construing the same.

Since a supervisor is an individual employed by an employer and since by the provisions of the Act (see Footnote 6, *supra*) the term "employee" does not include any individual employed as a supervisor, it appears clear that when Congress amended the phrase "the employees of any employer" to read "any individual employed by any person," Congress intended by the plain, unambiguous language used to include supervisors in the category described in the amendment as "any individual employed by any person."

Under the view that the plain meaning of the language used by Congress was at variance with the purpose of the Act and the intent of Congress, the Board resorted to legislative history and concluded that—

> "any individual employed by any person" in 8(b)(4)(i) refers to *supervisors who in interest are more nearly related to 'rank-and-file*

> *employees' than to 'management,'* as the term is generally understood. On the other hand, the term 'person' as used in 8(b)(4)(ii) would seem *to refer to individuals more nearly related to the management level.* So construed 8(b)(4)(i) would outlaw attempts to induce or encourage *employees and some supervisors,* to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage *others more nearly related to the managerial level* for the same objectives would be lawful. * * * [Emphasis ours.]

By such construction, the Board creates two categories of "supervisors" contrary to the definition of the term "supervisor" as used in the Act and contrary to court decisions. In one category are supervisors related to rank-and-file employees, and in the other category are supervisors more related to management. The Board's construction also requires that the phrase "any person engaged in commerce," appearing in § 8(b)(4)(i), shall be given a different meaning than the same phrase appearing in § 8(b)(4)(ii). The Board's construction would place labor organizations in an untenable and precarious position. Such construction in many instances would force labor organizations to run the risk of committing unfair labor practices without knowing which "supervisors" of an employer they could or could not lawfully induce or encourage and which "supervisors" are or are not persons engaged in commerce under § 8(b)(4)(ii).

The Board also contends that if the plain meaning of the language used in the new law be followed, § 8(b)(4)(ii) would be rendered meaningless and futile because the word "induce" appearing in § 8(b)(4)(i) has the same meaning as the word "threaten" appearing in § 8(b)(4)(ii). Our research leads us to the conclusion that the two words have separate and distinct meanings.

The Board contends that the plain meaning of § 8(b)(4)(i) is at variance with the purpose of the National Labor Relations Act and contrary to the intent of Congress.

The Supreme Court, in *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534, at pp. 543–544, stated:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, the Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." [Footnotes omitted.]

If under the above quoted decision, resort may properly be made to legislative history, we find therein no basis for the Board's contentions.

The basic purpose of the National Labor Relations Act is to promote industrial peace through collective bargaining and an orderly settlement of disputes.

The evil which Congress sought to correct, as stated by Representative Griffin, is as follows:

> Present law provides that it is unlawful for a union to induce or encourage "employees of any employer" to engage in a strike or "concerted refusal" to do their work for one of the

forbidden objects listed in Section 8(b)(4)—such as to force their Employer to cease doing business with a "primary employer." Since farm laborers, railway labor and supervisors are not "employees" within the meaning of the Act, unions may now, without penalty, induce them to engage in secondary boycotts. This bill corrects this by changing the word "employees" in the phrase quoted above to "any individual employed by any person." This change appears in clause 4(i). (Legislative History of the Labor Management and Disclosure Act of 1959, Vol. II, pp. 1520–1523 (G.P.O. 1959)).

In explaining this change, then Senator Kennedy and Representative Thompson, his conference associate, submitted an analysis of the differences between the House and Senate bills before the Conference Committee (105 Cong. Rec. 16589; II Leg. Hist. 1706–1707) with the following comment:

> In some industries supervisors belong to the union of the rank-and-file workers or as ex-members are sympathetic to it. Occasionally a union has induced the supervisors of a secondary employer to refuse to handle the goods of some primary employer with whom the union had a dispute. This conduct causes a true secondary boycott but it does not violate section 8(b)(4)(A) because section 8(b)(4)(A) forbids only the inducement of "employees" and supervisors are not "employees" within the statutory definition.
>
> * * * * *
>
> The House bill would extend the prohibition to inducement of supervisors. The present omission is an illogical loophole which should be closed if any legislation dealing with secondary boycotts is enacted. The substance of the House bill is therefore acceptable upon this issue.

Senator Morse, one of the conferees on the part of the Senate, who spoke in favor of the conference bill's provision, stated (105 Cong. Rec. 17882; II Leg. Hist. 1426):

> There are many instances also where a secondary boycott is conducted by a union agent going to a supervisor of employees, who often is a union member, and inducing him to shut off deliveries. Since the supervisor is subject to union discipline, such inducement would be clearly as effective as though inducement were applied to employees, themselves.

Senator Humphrey stated, as follows:

> [T]he amendment proposed by the Senator from Arizona [Mr. Goldwater] would change the words "employees of any employer" to "any individual employed by any person," and would delete the word "concerted" * * *
>
> As it now stands, section 8(b)(4) does not prohibit appeals or requests directed to supervisory or managerial employees because these individuals are not employees within the statutory definition. But they are surely individuals; and to substitute the word "individual" for the word "employees" would place requests and appeals to them within the prohibition of the law. (Remarks of Senator Humphrey on the Goldwater amendment. 105 Daily Cong. Rec. 5580, April 17, 1959, II Leg. Hist. 1037.)

In the Senate Committee analysis of this change, it is stated:

> The present law bans the inducement of employees of a secondary employer when the object thereof is to cease doing business with another employer. The revision includes the following features * * * (2) Inducement of a single employee or a supervisor employed by a secondary employer is banned. * * * (Senate Committee Analysis, Committee print, Subcommittee on Labor of the Committee on Labor and

Public Welfare, United States Senate, 86th Congress, First Session, Sept. 10, 1959, I Leg. Hist. 965.)

We do not agree that the plain wording of the new amendment is at variance with the purpose of the Act or the intent of Congress.

Our attention has been called to the fact that the Second Circuit in *N.L.R.B.* v. *Local 294, Internat'l Bro. of Teamsters, etc.*, 298 F. 2d 105 (2d Cir. 1961), has reached a different result from that reached in this opinion. We have reviewed such opinion but are not persuaded. Rather, we are persuaded by the following quotation from *Crooks* v. *Harrelson*, 282 U.S. 55 (1930), at p. 60, where the Court stated:

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principal so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson* v. *Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *In re Alma Spinning Company*, L. R. 16 Ch. Div. 681, 686; *King* v. *Commissioners*, 5 A. & E. 804, 816; *Abley* v. *Dale*, L. J. (1851) N. S. Pt. 2, Vol. 20, 233, 235. And see generally *Chung*

Fook v. *White*, 264 U.S. 443, 445; *Commr. of Immigration* v. *Gottlieb*, 265 U.S. 310, 313.

We disagree with the Board's conclusion that the handbilling of the various markets doing business with the petitioner was protected by the publicity proviso to § 8(b)(4). The proviso does not protect threats to handbill and handbilling of secondary employers in furtherance of a dispute with a distributor. Petitioner is a distributor and does not produce any products. The effect of the proviso in the case of a distributor is fully discussed in the opinion of this Court in *Great Western Broadcasting Corporation* v. *N.L.R.B.*, No. 17698, filed Nov. 9, 1962. We deem it unnecessary to repeat here what is stated in that opinion.

The Board erred in dismissing the unfair labor practice complaint. The Board's decision, findings and order are and each of them is set aside. The cause is remanded to the Board for further proceedings consistent with the views expressed herein.

(Endorsed) Opinion Filed Nov. 26, 1962.

FRANK H. SCHMID, *Clerk*.

United States Court of Appeals for the Ninth Circuit

No. 17,678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

Jan. 22, 1963

Before: CHAMBERS and JERTBERG, *Circuit Judges*, and CLARK, *District Judge*.

On November 26, 1962, this Court filed its opinion remanding the above cause to the board for further proceedings consistent with the views expressed therein.

The National Labor Relations Board has moved this Court to amend its opinion so that the Board on remand may determine whether the handbilling constituted a threat, restraint, or a coercion within the meaning of § 8(b)(4)(ii) of the Act, or was constitutionally protected free speech.

Neither of these defenses to the Union's illegal activities was raised or discussed by the Board in the prior proceedings nor urged or raised before this Court in the briefs or arguments.

The Board's reliance upon *Great Western Broadcasting Corp.* v. *N.L.R.B.*, No. 17698, filed November 9, 1962 (9th Cir.) is misplaced. In *Great Western*

the labor unions intervened in the proceedings and raised the restraint, coercion and constitutional questions. The first intimation of such grounds in the instant case was raised on the motion for clarification.

The motion of the Board is denied. See *Partenweederei, MS Belgrano, and Rudolph A. Oetker* v. *George Weigel,* No. 17178, filed December 11, 1962 (9th Cir.). See National Labor Relations Act, as Amended, 29 U.S.C. § 160(e): "No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

(Endorsed) Order Filed Jan. 22, 1963.

FRANK H. SCHMID, *Clerk.*

United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE

Before: CHAMBERS and JERTBERG, *Circuit Judges*, and CLARK, *District Judge*

THIS CAUSE came on to be heard upon the petition of Servette, Inc., filed December 14, 1961 to review an order of the NLRB issued by it on October 30, 1961 and

The Court heard arguments of respective counsel on July 12, 1962 and has considered the briefs and transcript of record filed in this Cause. On November 26, 1962, the Court being fully advised in the premises, handed down its decision, in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the Board's decision, findings and order are and each of them is set aside and that this cause be and hereby is remanded to the said National Labor Relations Board for further proceedings consistent with the view expressed in the opinion of this Court.

(ENDORSED) filed November 26, 1962.

FRANK H. SCHMID, *Clerk*.

A true copy.

Attest: February 21, 1963,

FRANK H. SCHMID, *Clerk*.

United States Court of Appeals for the Ninth Circuit

No. 17,698

GREAT WESTERN BROADCASTING CORPORATION, D/B/A KXTV, PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD, RESPONDENT, AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL, AND NATIONAL ASSOCIATION OF BROADCAST EMPLOYERS AND TECHNICIANS, LOCAL 55, INTERVENORS

Nov. 9, 1962

On Petition for Review of an Order of the National Labor Relations Board

Before: BARNES, HAMLEY, and JERTBERG, *Circuit Judges*

HAMLEY, *Circuit Judge:*

This is a proceeding to review an order of the National Labor Relations Board dismissing an unfair labor practice complaint. The case involves an attempt by two unions, assertedly using coercive methods, to force several companies to cease advertising on a television station with which the unions were having a labor dispute. It was charged that the union activity was proscribed by section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (Act), 29 U.S.C., § 158(b)(4)(ii)(B).

The charging party, and petitioner here, is Great Western Broadcasting Corporation, which operates television station KXTV in Sacramento, California. The unions, which were respondents in the Board proceedings and are intervenors here, are American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

The facts are not in dispute. A primary labor dispute between the unions and KXTV resulted in a strike which commenced on September 26, 1960. Picketing of the KXTV premises ensued. Among the advertisers who then regularly used the services and facilities of KXTV for advertising purposes were John Geer Chevrolet Company (Geer), Capitol Studebaker Company (Capitol), Rainbo Baking Company (Rainbo), Shell Oil Company (Shell), Burgermeister Brewing Corporation (Burgermeister), and Handy-Andy. Each of these advertisers is an employer engaged in commerce or in an industry affecting commerce within the meaning of the Act.

In an effort to win their labor dispute with KXTV, the unions took the following action:

> (1) had committees of the unions call upon all of the advertisers who used KXTV for the purpose of requesting them to discontinue their patronage of the station and assist the unions in their cause against KXTV;
>
> (2) had a committee call upon Capitol for the same purpose, in the course of which this advertiser was told that if it continued to advertise on KXTV the Labor Council would undoubtedly print the name of Capitol in the Labor Bulletin as not supporting the strike;
>
> (3) mailed to all KXTV advertisers a letter setting forth the background of the strike and

requesting discontinuance of advertising over the station, warning that failure to do so would bring an adverse economic reaction;[1]

(4) printed and distributed four thousand handbills listing KXTV as "unfair", and naming Geer, Rainbo, Shell and Burgemeister as advertisers who nevertheless continued to utilize the services of the station, such distribution being made in front of KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores which handled Rainbo bread and Burgermeister beer;[2]

(5) sent a letter to the San Francisco Labor Council asking the Council to return its Shell credit card to that company and to request the members of affiliated unions to do likewise;

(6) sent a later letter to the San Francisco Labor Council listing fourteen companies who were then advertising on station KXTV, with the

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[1] This letter contained these statements:

"* * * Any advertiser on this station while it is being operated by strike breakers will give the impression of taking sides in this dispute.* * *

"* * * We are about to launch an intensive campaign to bring the facts behind this dispute to the attention of the entire population covered by this station. We are sure you recognize the obvious fact that many members of organized labor and their families, and those sympathetic to the cause of organized labor, will have long-lasting resentment against any product or sponsor who takes sides in this dispute by advertising on this station during the course of this worthy strike.

"If you are currently advertising for clients on this station, or have any advertising projected for the next six months, we are sure you will wish to change your plans to avoid the inevitable adverse reaction. * * *"

[2] Copies of this leaflet were also found stuffed between loaves of bread at a supermarket supplied by Rainbo. The leaflet carried this note:

"This statement is directed to the customers of the above advertisers. It is not a request to employees to refuse to pick up, deliver or transport, or to refuse to perform any service."

observation that "any aid" the Council and its affiliated members "can give in this sponsor area" would be appreciated;

(7) showed to the President of Handy-Andy, with an appeal to stop advertising on KXTV, a copy of a newly-printed leaflet which gave the background of the labor dispute with KXTV, named Handy-Andy as a company which continued to do business with KXTV, and added the comment: "We think you will agree that this continued association is contrary to the best interests of working people and the public";[3]

(8) telephoned the general manager of Geer and, in conjunction with an appeal to have Geer cease advertising on KXTV, informed him that a new leaflet was being printed naming Geer as a sponsor still advertising on KXTV and that if Geer continued to do business with the station, this leaflet would be passed out in front of Geer's establishment, among other places.

As a result of the described union activity one KXTV advertiser was subjected to a secondary boycott and at least two other advertisers ceased doing business with that station.[4]

There was no picketing, or threat to picket, the place of business of any of the advertisers. There was

[3] One thousand of these leaflets were printed, and a like number of ten similar leaflets were printed, each naming a different company which continued to advertise on KXTV. None of these leaflets, however, were distributed.

[4] As a result of the first letter sent by the unions to the San Francisco Labor Council, Shell received numerous letters enclosing Shell credit cards. The individual writers explained that they would pick up their cards in the future when Shell discontinued its advertising over KXTV.

On October 10, 1960 Capitol cancelled its $8,500 advertising contract with KXTV for the duration of the strike. In a letter of explanation, Capitol told KXTV that after its televised commercial one evening, the company's phones were "jammed" from 7:00 to 9:30 P.M. by callers claiming to be union people. These callers criticized Capitol for not supporting the strike and, in sub-

no physical violence or threat of physical violence. The handbills were truthful and their distribution was peaceful. None of the described union activity was designed to bring about a work stoppage by employees of any advertiser, and none had that effect.

On these facts the Board, with one member dissenting, held that the described union activity was protected by the publicity proviso at the end of section 8(b)(4) of the Act.[5] The complaint was therefore dismissed in its entirety.[6]

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stance, said that for this reason they would not do business with the company.

On November 10, 1960, and as a result of the pressure described above, Rainbo cancelled a $26,000 advertising contract which it had entered into with KXTV a month previously.

[5] Section 8(b)(4) provides in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, * * *

* * * * *

"*Provided further*, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his em-

(See footnote 6 on next page)

Petitioner here challenges the Board conclusion that the publicity proviso is applicable under the facts of this case. It contends that since that proviso pertains only to publicity concerning a "product" or "products" which are "produced" by a primary employer and which are thereafter "distributed" by another employer, the service rendered by a television station is not included therein.[7]

The Board, as respondent on this review, joins issue on this point. The two unions, which were respondents in the agency proceeding and are intervenors here, support the Board's position that the publicity proviso is applicable and protects the union activity in question.

In determining which of these conflicting constructions of the proviso is correct, the critical statutory words, none of which are defined in the Act, are "product," "produced," and "distributed."

In its broadest sense, the term "product" denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise permits, to refer to a completed service as a "product".

In this case, however, as all seem to recognize, the context in which the term "product" appears in the proviso precludes the view that the television service rendered by KXTV, considered alone, is a "product"

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ployment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; * * *"

[6] A preliminary injunction against the unions which the Board had obtained, reported *sub nom. Brown* v. *American Federation of Television & Radio Artists, San Francisco Local*, N.D. Cal., 191 F. Supp. 676, was thereafter dismissed.

[7] In support of the same proposition, the National Association of Broadcasters has filed an *amicus curiae* brief in this court.

within the meaning of the proviso.[8] One reason for this conclusion is the fact that in two other places in section 8(b)(4), the term "services" is used in contradistinction to tangible articles.[9] It is likely that Congress would have followed this same format if it had intended the publicity proviso to apply with regard to a primary employer who renders services instead of manufactures tangible articles.

A second and still more persuasive reason why television advertising service, considered alone, could not be a "product" within the meaning of the publicity proviso lies in the fact that the only "products" there referred to are those which are capable of being "distributed" by "another employer." An advertising service rendered by a television station is not capable of being so "distributed," least of all by an employer

[8] In holding that the "privilege" which a television network sells to a sponsor is not a "commodity" within the meaning of sections 2(a) and 3 of the Clayton Act, 15 U.S.C., sections 13(a), 14 it has been held that the most reliable guide to the meaning of the word is the context in which it is employed. *Columbia Broadcasting System v. Amana Refrigeration, Inc.*, 7 Cir., 295 F. 2d 375, 378.

[9] In section 8(b)(4)(i), the following words are used: "* * * to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities *or to perform any services;* * * *" [Emphasis supplied.] Near the end of the publicity proviso itself, the following language appears: "* * * to refuse to pick up, deliver, or transport any goods, *or not to perform any services,* * * *" [Emphasis supplied.] In section 8(b)(4)(i)(ii)(B), while the word "services" is not used, the following language indicates the same differentiation between a primary employer who produces, processes or manufactures a tangible article, and one who does not: "* * * to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, *or to cease doing business with any other person,* * * *" [Emphasis added.]

whose only relationship with the station is that of an advertiser.

The Board, however, believes that it has overcome this difficulty by holding that it is not the television service of KXTV, standing alone, which is the "product" here, but the item being advertised on that station. KXTV becomes one of the "producers" of the items advertised, the Board reasons, "by adding its labor in the form of capital, enterprise and service * * *" to such items.

It may be noted, however, even before testing the correctness of this line of reasoning, that it leads to the rather remarkable conclusion that a television station can be a producer of automobiles, bread, gasoline and beer.[10]

In reaching its conclusion the Board followed its decision rendered on October 31, 1961, in *Middle South Broadcasting Co.*, 133 NLRB No. 1698. The primary employer in that case was a radio broadcasting station. In turn, the decision in *Middle South Broadcasting* was based upon the Board's decision rendered on August 10, 1961 in *International Brotherhood of Teamsters, etc.* (*Lohman Sales Company*) 132 NLRB 901. There the primary employer was a wholesale distributor of cigarettes, cigars, other tobacco products, candy, and related products. The issue was whether a wholesale distributor is a producer of products within the meaning of the proviso.

In the *Lohman* case the Board first determined that, so far as human effort is concerned, labor is the prime

[10] It also requires one to regard the advertisers of those products, who either manufacture the articles themselves or distribute articles manufactured by companies having no connection with the television station, as the "distributors" of articles "produced" by a television station.

requisite of one who produces."[11] The Board then reasoned that not only the actual manufacturer, but also the wholesaler, adds "labor in the form of capital, enterprise, and service to the product he furnishes the retailers." "In this sense, therefore," the Board stated, "Lohman, as the other employers who 'handled' the raw materials of the product before him, is one of the producers of the cigarettes distributed by his customers. * * *"

In the Board's contemplation then, the "production" of cigarettes includes every phase of activity, beginning with the combination of tobacco seed, earth and water, and ending with the ready availability of cigarettes to the smoking public. Each employer in the process of production begins with what, to him, are raw materials, and "produces" what to him is a finished "product." The wholesale distributor (or in our case the television station) "handles" cigarettes which are not yet readily available to the members of the smoking public in the same sense as the manufacturer "handles" raw tobacco which has not yet become

[11] In reaching this conclusion the Board relied upon dictionary definitions, primarily upon a definition of "product" to be found in A. Merriam Webster, Webster's New Collegiate Dictionary, 1959, and an explanation of the term "production" contained in Black's Law Dictionary, Fourth Edition, West Publishing Co., 1951, pages 374–375. The latter definition is as follows:

"In political economy. The creation of objects which constitute wealth. The requisites of production are labor, capital, and the materials and motive forces afforded by nature. Of these, labor and the raw materials of the globe are primary and indispensable. Natural motive powers may be called in to the assistance of labor and are a help, but not an essential, of production. The remaining requisite, capital, is itself the product of labor. Its instrumentality in production is therefore, in reality, that of labor in an indirect shape. Mill, Political Economy; Wharton."

cigarettes. In this sense the wholesale distributor and the television station are producers of products capable of being distributed by their successors in the production process.

As we have indicated earlier in this opinion, the terms "product," "produce" and "production" may be construed this broadly if they are not found in a more restrictive context. But, as we have also indicated earlier, the context in which the words "produce" and "product" are found indicates that in using them Congress was referring to one kind of economic activity and its result rather than to all economic activity and its result.

The Board proceeds on the assumption that Congress intended "product" to encompass the results of all forms of economically productive labor. Yet it concedes that a television station's product is not advertising but the subject of the advertising. So long as the subject of the advertising is a tangible article these propositions need not lead to an incongruous result.

But if, instead of a tangible article, the subject of the television advertising is a service, such as banking or cleaning, an internal inconsistency at once appears.[12] It derives from the fact that while television advertising service, as such, is not to be regarded as a "product" under the proviso, because it is not capable of being distributed, a service being advertised on television is to be regarded as a "product," although it is equally incapable of being distributed.

Thus, while the Board adopts a broad construction of

[12] There is evidence in the case before us that the unions directed informational activity against one bank and one dry cleaning establishment. Since neither the bank nor the cleaners was found to be engaged in commerce or an industry affecting commerce, however, the union's activity with respect to them is not in issue here.

the term "product" in order to obviate the incongruity of saying that a television advertising service is capable of being distributed, we find that, after all, the underlying difficulty has not been avoided. The Board is still saying that a service, though one being advertised rather than the television service itself, is a "product," although not capable of being distributed.

Only now the Board has involved itself in the additional difficulty of saying that a television station is a "producer" of banking and cleaning services which are "distributed" by banks and cleaners. If the capacity for distribution requirement is to be ignored it might as well be at the outset, with reference to television advertising service, thereby avoiding the futile involvements inherent in the Board's broad construction.

The Board expressed the view in *Lohman* that unless its concept were accepted, it must follow that "vast numbers of our working population produce nothing."[13] The weakness of this argument lies in the assumption that if, for the purposes of the proviso, the term "product" must be limited to a tangible article, it must follow that even in a broad economic sense, only those engaged in manufacturing tangible articles are "producers."

The two frames of reference should not be confused. For the limited purposes of the proviso only those who deal with tangible articles are "producers," but in general economic theory, all who engage in useful labor, whether or not directly related to tangible articles, are

[13] Developing this idea, the Board said in *Lohman*:

"• • • Their thought, labor, or business enterprise is not a 'product.' We do not believe that the plain meaning of the words 'product' and 'produced' requires the Board to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled."

"producers." In order to hold that a television station is not, within the meaning of the proviso, the producer of automobiles which it advertises, it is not necessary to conclude that the engineers, announcers, advertising men and others employed by the station are not "productive." They perform a television advertising service, just as the employees of Lohman perform a distribution service. But since the fruit of their labor is not capable of physical distribution by others, it is not a "product" as that term is used in the proviso.

The Board believes that the legislative history indicates that the result reached in *Lohman, Middle South Broadcasting*, and this case, is what Congress really intended.

We very much doubt that the statutory language of the publicity proviso is ambiguous with regard to the meaning of "produced," thereby warranting reference to legislative history. While this term is not defined in the Act, the context indicates to us that, in the proviso, Congress was referring to the activity of a primary employer in applying capital, labor and enterprise to effect the conversion of raw materials in his possession into a more finished tangible article.

In section 8(b)(4)(i)(ii)(B), which contains the only statutory reference to the kind of employers who can be the creators of "products," as that term is used in the Act, the words used are: "* * * the products of any other producer, processor, or manufacturer * * *"[14] The words "processor" and "manufacturer" refer to persons engaged in a physical creative activity, and it is reasonable to believe that the word "producer" was used in the same sense. There is no reason to believe that "produced" was used in the proviso in any different sense than "producer" was used in section 8(b)(4)(i)(ii)(B).

[14] The pertinent part of section 8 (b)(4) is quoted in note 5.

But, assuming that resort to legislative history is appropriate, we believe it to be inconclusive as to the point under discussion.

It is true that this history indicates that some Senators and Congressmen expressed the view that inclusion of the publicity proviso was necessary because without it, section 8(b)(4)(ii)(B) might outlaw forms of publicity such as leaflets, radio broadcasts, and newspaper advertisements, thereby impinging upon free speech.[15] The Board argues, in effect, that there is no reason to believe that Congress was less interested in preserving free speech where the primary employer is a distributor, or a radio or television operator, than when he is a manufacturer of tangible articles.

If all that Congress really had in mind in adding the publicity proviso was to implement, with respect to leaflets, broadcasting and newspapers, the free speech guarantee of the First Amendment, the proviso was not needed and would have to be regarded as surplusage. Section 8(c) of the Act, 29 U.S.C. § 158(c), already in effect, provided complete implementation of

[15] When the proposed 1959 amendment of section 8(b)(4) got to conference without such a proviso, Senator Kennedy and Representative Thompson expressed this concern. (105 Cong. Rec. 16591; II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [Leg. Hist.] 1708). The proviso was thereafter added as a "clarification." (105 Cong. Rec. 18022; II Leg. Hist. 1712). In discussing the addition of this proviso, Senator Kennedy explained that, without the proviso, the amendment of section 8(b)(4) would have prohibited "the handing out of handbills or even taking out an advertisement in a newspaper." (105 Cong. Rec. 17720, 17898-17899; II Leg. Hist. 1388-1389, 1432). Senator Douglas and Representative Udall similarly expressed the view that the proviso was necessary to protect free speech. (105 Cong. Rec. 19904, 18135; II Leg. Hist. 1834, 1722).

the First Amendment in this regard.[16] As intervenors in this case concede, section 8(c) is "no more than a restatement of the principle embodied in the First Amendment," quoting *NLRB* v. *La Salle Steel Co.*, 7 Cir., 178 F. 2d 829, 835.

Section 8(c), however, does not protect, under the guise of free speech, publicity activity which is associated with coercion, since that subsection ends with the words, "* * * if such expression contains no threat of reprisal or force or promise of benefit." Thus if Congress desired to protect any kind of publicity which was associated with coercion, it was necessary to add statutory language which did not contain the limitations built into section 8(c). Apparently Congress did want to protect some publicity of this kind, and so solved the problem by adding the publicity proviso.[17]

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[16] Section 8(c) reads:

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefits."

[17] The Board has itself held, in *Lohman, Middle South Broadcasting Co.* and the case now before us, that the publicity proviso excepts certain publicity although coercion may be involved. The statutory authority for this is to be found in section 8(b)(4)(ii), quoted in note 5.

The Board said in *Lohman*, at page 904:

"* * * While such conduct otherwise might constitute restraint and coercion, we agree with the conclusion of the Trial Examiner that Respondent's hand-billing in this case was protected by the proviso to Section 8(b)(4)."

The Board reached a similar conclusion in its *Middle South Broadcasting Co.* decision, saying, at page 1705:

"* * * We also agree with his [Trial Examiner's] finding that, unless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patron-

This demonstrates, we think, that the meaning of "produced," as used in the publicity proviso, is not to be given an all-inclusive construction on the theory that Congress was trying to guarantee free speech. On the contrary, it suggests that since the publicity being protected by the proviso could be of a kind associated with threats, coercion, or restraint, Congress did not intend an expansive exception but chose words which would have limited application.

Had Congress intended to except publicity concerning primary employers whose own products were of an intangible nature not capable of "distribution," the proviso could have been much simpler than that which was enacted. It would have been sufficient to say that nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, "for the purpose of truthfully advising the public (including consumers) that *an establishment is operated*, or goods are produced or distributed, by an employer engaged in a labor dispute. * * *" [Emphasis supplied.]

In fact these identical words were proposed in a Senate Resolution, instructing the Senate conferees on S. 1555, offered in the Senate on August 28, 1959, by Senators Kennedy, McNamara, Morse and Randolph.[18] This resolution was not adopted.

Unlike the language proposed in the resolution which was not adopted, the statutory proviso does not

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ize' leaflets urging a consumer boycott of secondary employers still advertising on WOGA, would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that section."

In the case now before us the Board, in its decision, makes reference, with approval, to its holding in *Lohman* that publicity activity may be protected by the publicity proviso, although such activity "might constitute restraint and coercion. * * *"

[18] II Leg. Hist. 1383.

include, among designated primary employers, those who "operated" establishments or "distributed" goods. The only primary employers referred to in the enacted proviso are those who produce a product or products. This class of employers is further defined and restricted by the additional provision that the employer must be one who produces products capable of distribution.

It seems unlikely that an easy way of expanding the coverage of the proviso would have been rejected and detailed limiting provisions (which under the Board's reasoning become surplusage) would have been developed, if it had been intended that the proviso was to have the broad coverage given to it by the agency.[19]

The foregoing considerations lead us to conclude that the publicity proviso which is a part of section 8(b)(4)(B) does not protect publicity to the effect that television service is rendered by a station with whom the labor organization has a primary dispute, which service is being utilized by other employers.

Intervenors argue, however, that even if the publicity proviso is inapplicable there are two other reasons why the Board order should be sustained. These are: (1) Section 8(b)(4)(ii)(B) relates only to union activity which tends to "threaten, coerce, or restrain," and the activity here in question was not of that kind; and (2) the union activity involved in this case is

[19] We do not, however, agree with petitioner that significance is to be attached to the fact that, during the Congressional debates, the proviso as it was finally enacted was referred to only as one which would permit publicity concerning "goods" or "products." A close reading of the legislative history leads us to believe that reference to "goods" and "products" produced by non-union or struck "manufacturers" served only as an exemplification of the typical secondary boycott situation rather than as a conscious expression of Congressional purpose.

protected by the free speech and free press provisions of the First Amendment to the Federal Constitution.

The Board relied on neither of these grounds in entering its order here under review. With regard to the "coercion" argument, a determination is complicated by the fact that eight separate and distinct union actions are drawn into question. Some may be coercive and some may not.

In our view, the Board should make a determination as to the merits of these two additional arguments advanced by intervenors before this court is called upon to consider them.

The Board order under review is reversed and the cause is remanded to that agency for consideration, on the present record, with such augmentation thereof, if any, as it may deem appropriate, of the additional questions raised by intervenors, as noted above.

(Endorsed) Opinion Filed Nov. 9, 1962.

FRANK H. SCHMID, *Clerk.*

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the

domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing

in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * * *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

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